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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/769,532	01/30/2004	Robert G. Whirley	1880-17 RCE III	8638
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Hoffmann & Baron LLP 6900 Jericho Turnpike Syosset, NY 11791				
EXAMINER				
SWEET, THOMAS				
ART UNIT		PAPER NUMBER		
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notification of Non-Compliant Appeal Brief (37 CFR 41.37)	Application No. 10/769,532	Applicant(s) WHIRLEY ET AL.	
	Examiner Thomas J. Sweet	Art Unit 3774	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address--

The Appeal Brief filed on 21 October 2009 is defective for failure to comply with one or more provisions of 37 CFR 41.37.

To avoid dismissal of the appeal, applicant must file an amended brief or other appropriate correction (see MPEP 1205.03) within **ONE MONTH or THIRTY DAYS** from the mailing date of this Notification, whichever is longer.
EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136.

1. ☐ The brief does not contain the items required under 37 CFR 41.37(c), or the items are not under the proper heading or in the proper order.
2. ☐ The brief does not contain a statement of the status of all claims, (e.g., rejected, allowed, withdrawn, objected to, canceled), or does not identify the appealed claims (37 CFR 41.37(c)(1)(iii)).
3. ☒ At least one amendment has been filed subsequent to the final rejection, and the brief does not contain a statement of the status of each such amendment (37 CFR 41.37(c)(1)(iv)).
4. ☐ (a) The brief does not contain a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number and to the drawings, if any, by reference characters; and/or (b) the brief fails to: (1) identify, for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function under 35 U.S.C. 112, sixth paragraph, and/or (2) set forth the structure, material, or acts described in the specification as corresponding to each claimed function with reference to the specification by page and line number, and to the drawings, if any, by reference characters (37 CFR 41.37(c)(1)(v)).
5. ☐ The brief does not contain a concise statement of each ground of rejection presented for review (37 CFR 41.37(c)(1)(vi)).
6. ☐ The brief does not present an argument under a separate heading for each ground of rejection on appeal (37 CFR 41.37(c)(1)(vii)).
7. ☐ The brief does not contain a correct copy of the appealed claims as an appendix thereto (37 CFR 41.37(c)(1)(viii)).
8. ☐ The brief does not contain copies of the evidence submitted under 37 CFR 1.130, 1.131, or 1.132 or of any other evidence entered by the examiner **and relied upon by appellant in the appeal**, along with a statement setting forth where in the record that evidence was entered by the examiner, as an appendix thereto (37 CFR 41.37(c)(1)(ix)).
9. ☐ The brief does not contain copies of the decisions rendered by a court or the Board in the proceeding identified in the Related Appeals and Interferences section of the brief as an appendix thereto (37 CFR 41.37(c)(1)(x)).
10. ☒ Other (including any explanation in support of the above items):

See Continuation Sheet.

/Thomas J Sweet/
Primary Examiner, Art Unit 3774

Continuation of 10. Other (including any explanation in support of the above items): The brief does not contain a statement of the status of an amendment filed subsequent to the final rejection as required by 37 CFR 41.37(c)(1)(iv). The appeal brief is defective based on section IV which states "In response to the final rejection mailed May 22, 2009, a Notice of Appeal was filed on August 21, 2009 without further amendments or arguments. In addition, no further amendments have been presented after the filing of this appeal." An after final argument date 07/22/2009 appears in the file. The Advisory Action mailed 8/12/2009 is material to the Appeal having placed additional arguments and extrinsic evidence on the record which establishing that PEG is miscible in body fluid and does not rely on tissue contact for elution as argued. The content of the Advisory action appears below.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986), regarding official notice. The rejection is two pronged there is both official notice and evidence. The official notice was not addressed so it is admitted prior art. The Examiner points to both Rhee et al and Shukla (6432438, example 15) as extrinsic evidence demonstrating that it is well known to use PEG as a means of drug delivery. Regarding the teachings of Rhee et al, the disclosure clearly stated that PEG is hydrophilic and as the extrinsic evidence of (6432438, example 15) releases drugs because it is hydrophilic and completely miscible in water (or body fluid since that is water based).